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BEFORE THE MONTANA STATE AUDITOR,  
EX-OFFICIO COMMISSIONER OF SECURITIES AND INSURANCE  
HELENA, MONTANA

IN THE MATTER OF:	)	Case No. I-11-08-04-01
	)	
MARTIN BOWER,	)	
	)	
Respondent.	)	HEARING EXAMINER'S
	)	<u>PROPOSED</u>
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
LEE LYTTON, as Guardian and	)	AND ORDER
Conservator of IDA ROSE LYTTON,	)	
an Incompetent Person,	)	
	)	
Intervenor.	)	
	)	

Pursuant to mailed notice, on Tuesday, January 11, 2005, in the small Conference Room of the Lake County Courthouse, a contested case hearing was commenced by Kevin Phillips, the initial Hearing Examiner in the above matter. Pursuant to further mailed notice, on Friday, March 16, 2007, in the Second Floor Conference Room 608 of the State Auditor's Office, 840 Helena Avenue, Helena, Montana, a continuation of the January 11, 2005, contested case hearing was conducted to conclusion by the undersigned Hearing Examiner in this matter. The hearing was

HEARING EXAMINER'S PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND ORDER - 1

1 conducted pursuant to the hearings and appeals provisions of the  
2 Montana Insurance Code (§§ 33-1-701, et seq., MCA); the contested  
3 case provisions of the Montana Administrative Procedure Act (§§  
4 2-4-601, et seq., MCA); and Montana's statutory, public partici-  
5 pation in governmental operations notice and hearing provisions  
6 (§§ 2-3-101, et seq., MCA).

7 At the contested case hearing, Roberta Cross Guns, Legal  
8 Counsel for the Montana State Auditor's Office (MSAO) represented  
9 the Insurance and Securities Departments (respectively, DOI and  
10 DOS; collectively, Department) of the Commissioner of Insurance  
11 and Securities (Commissioner). The Respondent, Martin Bower  
12 (Bower) appeared on his own behalf at the initial hearing.  
13 Jeffrey M. Doud represented him at the continuation of that  
14 hearing. Intervenor, Ida Rose Lytton and her Guardian (Ida Rose)  
15 were represented by David Bjornson at the continuation hearing.

16 At the initial hearing, testimony was presented on behalf of  
17 the Department from Lynne Egan (Egan), DOS Bureau Chief; Lee  
18 Lytton (L. Lytton), son of Ida Rose Lytton; Tim Skiftun, a  
19 Merrill registered securities salesperson; James and Patricia  
20 Currie, and Helena Zorn, solicitees of Bower; Michael J.  
21 Blodnick, CEO of Glacier Bank Corporation; Jean Luckey,  
22 securities broker for Helena Zorn; and John Forsman, MSAO  
23 investigator. Curtis Carey, Regional Director of Banker's Life  
24 and Casualty Company (Bankers) provided testimony on behalf of  
25 Bower at the initial hearing. At the continuation hearing, Bower  
26 presented testimony on his own behalf followed by rebuttal

1 testimony from Pam Lytton (P. Lytton), daughter-in-law of Ida  
2 Rose Lytton, on behalf of the Department.

3 The following documents were offered and received into  
4 evidence on behalf of the Department at the initial hearing:  
5 October 7, 2004, Bankers' "Authorization to Transfer Funds"  
6 (Department's Exhibit 1); October 26, 2004, letter from Ida Rose  
7 Lytton to Bankers' Wanda Hutson (Department's Exhibit 2);  
8 October 7, 2004, Bankers' "Authorization to Transfer Funds"  
9 (Department's Exhibit 3); November 5, 2004, letter from Ida Rose  
10 Lytton to Timothy Skufkin of Merrill Lynch (Department's Exhibit  
11 4); August 9, 2004, Bankers' "Application for Annuity"  
12 (Department's Exhibit 5); and August 9, 2004, "Continuation of  
13 Application LA06T for Policy Form # LA-14957" (Department's  
14 Exhibit 6).

15 At the initial hearing, the following document was offered  
16 and received into evidence on behalf of Bower: November 22, 2004,  
17 e-mail press release (Bower Exhibit A).

18 From the testimonial and documentary evidence presented, the  
19 Hearing Examiner makes the following proposed:

20 FINDINGS OF FACT

21 1. On or about August 9, 2004, DOS Bureau Chief, Lynne  
22 Egan (Egan) received a phone call from Bower, who was in the  
23 physical presence of Helena Zorn (Zorn), regarding the where-  
24 abouts of Glacier Bank Corporation (Glacier) stock shares owned  
25 by Zorn. Zorn then spoke directly to Egan saying Bower told her  
26  
27

1 he could liquidate her stock at less cost than her broker at  
2 Raymond James (James). (2005 Tr. 5.)

3 2. As a result of Zorn's concern that some certificates  
4 had been stolen, Egan contacted Jean Luckey (Luckey) at James,  
5 who was the sales person Zorn felt had taken her stock and not  
6 returned it. Egan was told by Luckey that since the stock cer-  
7 tificates were in street name (in the name of the brokerage for  
8 the benefit of the investor), they could not be delivered upon  
9 request, but first had to be registered in her name before being  
10 physically delivered to her. (2005 Tr. 6.) After relaying this  
11 information to Zorn, Egan received a second call from her con-  
12 cerned about why Bower recommended she sell all of her Glacier  
13 stock in order to purchase an annuity from him. (2005 Tr. 7.)  
14 At the time, Zorn was living in a Kalispell assisted living  
15 facility. (2005 Tr. 7; 83; 123.)

16 3. In early November 2004, Egan received a telephone call  
17 from Lee Lytton (L. Lytton) regarding repeated contacts Bower had  
18 made to his mother, Ida Rose Lytton (Ida Rose) an Alzheimer's  
19 disease sufferer, ultimately convincing her to liquidate her two  
20 portfolios at Merrill and purchase a Bankers annuity from him.  
21 (2005 Tr. 8.) Not understanding an October 7, 2004, submitted  
22 letter of instructions signed by Bower and Ida Rose regarding  
23 transfer of funds (Exhibit 1), Ida Rose's Merrill stockbroker,  
24 Tim Skiftun (Skiftun) contacted Ida Rose, who could not remember  
25 completing any paper work. (2005 Tr. 8; 62.) With the assis-  
26 tance of Skiftun's sales associate, Percy Cline (Cline), Ida Rose

1 prepared an October 26, 2004, letter (Exhibit 2) telling Bankers  
2 she did not want to liquidate her Merrill portfolios. (2005 Tr.  
3 8-9; 63-64.) Thereafter, Merrill received a November 1, 2004,  
4 (Exhibit 3) letter of instruction signed by Bower and Ida Rose  
5 (2005 Tr. 13) to totally liquidate the portfolios, pursuant to  
6 which Ida Rose sent a November 5, 2004, letter (Exhibit 4)  
7 directing Merrill not to take account liquidation instructions  
8 for her accounts without direct verbal and written instructions  
9 from her to do so, and expressing no desire to transfer her  
10 accounts. (2005 Tr. 9; 13-14; 53; 64.)

11 4. Ida Rose's oldest son, Dan Lytton (D. Lytton) testified  
12 to his presence when she received a telephone call from Bower  
13 regarding not wanting Bower to get in trouble. (2005 Tr. 15.)  
14 He also testified to his mother's Alzheimer's and its progression  
15 in the last two to three years. (2005 Tr. 45-46.)

16 5. Egan testified to Bower not being registered as an  
17 investment advisor or as an investment advisor representative and  
18 recommending to Zorn and Ida Rose respectively, to not make  
19 security liquidations without proper licensure, as well as with-  
20 out ascertaining the suitability of his recommendation, and not  
21 disclosing such. (2005 Tr. 18-19; 56.) Bower's recommendations  
22 would have had significant negative tax consequences for Zorn and  
23 were definitely unsuitable for her circumstances. (2005 Tr. 19-  
24 20.) Bower was giving investment advice on a routine basis with-  
25 out being licensed to do so. (2005 Tr. 26; 29.)

1        6.    Ida Rose testified to having no independent memory of  
2 meeting with Bower (2005 Tr. 49-50); of speaking with Bower on  
3 the telephone (2005 Tr. 53); not understanding what Exhibits 1-4  
4 were, only her signature (2005 Tr. 50-52).

5        7.    Under cross-examination, Ida Rose had no memory of the  
6 purpose of her meeting with Bower or discussing her children with  
7 him (2005 Tr. 54); discussing dollar amounts for a death benefit,  
8 or what the interest rate was that her investments were earning  
9 (2005 Tr. 55); how many accounts she held at Merrill, of Bower  
10 informing her he was not licensed to conduct securities business,  
11 or of him discussing the features and benefits of a deferred  
12 annuity (2005 Tr. 56).

13       8.    Skiftun testified to being a registered sales person  
14 with Merrill, and Ida Rose having been his investment client for  
15 eight or nine years. (2005 Tr. 59.) Ida Rose's investment  
16 objective over these years was not for income, but growth for her  
17 heirs. (2005 Tr. 61.) She had an approximate income of \$5,000  
18 per month. (2005 Tr. 122.) Pursuant to receiving account  
19 liquidation instructions (Exhibit 1), Skiftun telephoned Ida Rose  
20 whose initial response was what papers. (2005 Tr. 62.) From  
21 that conversation, Skiftun determined Ida Rose did not want her  
22 accounts transferred, so in order to effectuate her wishes,  
23 Skiftun said he would have his assistant draft a letter for her  
24 signature that would negate the transfers. (2005 Tr. 63.) Sub-  
25 sequent to Ida Rose signing the first letter, Skiftun received a  
26 telephone call from Bower at Ida Rose's house. (2005 Tr. 66;

1 68.) It is also Skiftun's understanding that Ida Rose did not  
2 want the second November 1, 2004, transfer to occur, and con-  
3 tinues to have that intention. (2005 Tr. 64-65.)

4 9. MSAO investigator, John Forsman (Forsman) interviewed  
5 Ida Rose on January 4, 2005, at her home in Pablo, Montana (2005  
6 Tr. 121-22), who recalled her to be very forgetful, and having  
7 told him three stories, all the same story over and over of  
8 things that happened. (2005 Tr. 122.) The back door of her  
9 house was frozen open, bags of groceries on the floor that had  
10 apparently been there for some time, and the house was generally  
11 unkempt. (2005 Tr. 122.)

12 10. Forsman also interviewed Zorn, who told him that Bower  
13 had said her Glacier stock had been stolen and advised her to  
14 call the Department. Bower also told her that he and Bankers  
15 could make her more money and do things with her stock that  
16 others couldn't. (2005 Tr. 123.)

17 11. Per his discussions with personnel at Bankers, Forsman  
18 determined that the successful selling of annuity products to  
19 Zorn and Ida Rose would have yielded a total of \$9,820.25 in  
20 commissions. (2005 Tr. 121.)

21 12. Bankers' Regional Director, James Carey (Carey) from  
22 its Spokane insurance branch office, (2005 Tr. 150) testified to  
23 being securities licensed, and a licensed insurance agent in  
24 Montana since the Spring of 2003 (2005 Tr. 127; 143), and in  
25 charge of hiring and training agents (2005 Tr. 127). He is  
26 licensed/registered as a representative and not as an investment

1 advisor, and does not supervise any securities sales people.

2 (2005 Tr. 145.)

3 13. Carey recalled Bankers unit sales manager, Bill  
4 Crenshaw (Crenshaw), who is securities licensed in Montana, but  
5 is not registered as an investment advisor (2005 Tr. 152), saying  
6 he had received a telephone call from Bower about a person in  
7 Kalispell who had long time stock that had great appreciation and  
8 advised Bower of the potential for a big tax issue. (2005 Tr.  
9 129-30.) In a follow-up conversation with Crenshaw, Carey was  
10 told Bower was asked not to proceed. (2005 Tr. 130.) Carey was  
11 not aware of any annuity purchase application coming through his  
12 office regarding these securities, identified by Bower as being  
13 Zorn's. (2005 Tr. 130-31.) He recalls no complaints made to his  
14 office regarding pushy sales tactics by Bower. (2005 Tr. 131.)  
15 For Carey, an indicator of an agent's aggressiveness is a  
16 reported "go-back" ratio, which to him means the more go-backs,  
17 the less aggressive. Bower's 35-40% ratio is higher than the  
18 average in Carey's office. (2005 Tr. 134.) For Carey go-backs  
19 do not translate into coercion without someone calling and tell-  
20 ing him so. (2005 Tr. 155.)

21 14. Bankers' slogan is "We specialize in seniors" which to  
22 Carey means specialization in marketing health and life products  
23 to senior middle America (2005 Tr. 137) with an intent of helping  
24 them solve issues revolving around many retirement planning  
25 issues regarding health insurance, retirement savings, life  
26 insurance, and final expenses. Since every situation is

1 different, each recommendation is to be totally based around  
2 their situations, and Carey's rule is that having all of their  
3 money in a Bankers' annuity account would not be right. (2005  
4 Tr. 138.)

5 15. Carey testified that commissions paid by Bankers to  
6 producers such as Bower for annuity sales are not deducted from  
7 the premium paid by the customers. (2005 Tr. 140.) But, the  
8 proceeds generated from the sales of annuities are used by  
9 Bankers to pay those commissions. (2005 Tr. 146.)

10 16. To Carey, an agent advising a person to liquidate a  
11 securities portfolio because the securities are not performing  
12 well constitutes investment advice. (2005 Tr. 154.) Bower is  
13 not licensed to sell securities or give investment advice in  
14 Montana. (2005 Tr. 161.) Bower did not return to Ida Rose after  
15 the second letter was issued to Merrill. (2005 Tr. 164.)  
16 Although having knowledge of such, Carey never talked to Ida Rose  
17 regarding negation of her transaction or to Zorn about her tax  
18 consequences. (2005 Tr. 165.)

19 17. Being in the market for health insurance for him and  
20 his wife, James Currie testified to Bower coming to their house  
21 at their request. (2005 Tr. 72.) Not having the type of health  
22 insurance they needed, Bower offered to sell them Bankers'  
23 annuities. (2005 Tr. 70.) On June 29, 2000, Mrs. Currie made a  
24 conditional purchase of a \$5,000 annuity subject to the stipu-  
25 lation that Bower would hold and not process her check payable to  
26 Bankers until the following week when it would be known if there

1 was going to be an interest rate change on the annuity. (2005  
2 Tr. 78-9.) Bower insisted the check and application be dated the  
3 same, but agreed he would not process or cancel the check until  
4 the Curries told him to do so. (2005 Tr. 72 and 75.) On July 6,  
5 2000, she asked Bower to return her check since the interest rate  
6 had not changed. (2005 Tr. 80.) Contrary to their instructions,  
7 the Curries discovered the check had been deposited and cashed on  
8 July 1, 2000. (2005 Tr. 71.)

9 18. After making excuses (2005 Tr. 71), Bowers said he  
10 could not return her check (2005 Tr. 80) and admitted he had  
11 banked the check. (2005 Tr. 71.) After a long series of phone  
12 calls and attempts to contact Bower, the Curries made contact  
13 with Bankers' main offices in Chicago, and ultimately received a  
14 check from them on August 10, 2000, sans interest. (2005 Tr.  
15 71.)

16 19. Glacier CEO (2005 Tr. 88), Michael Blodnick (Blodnick)  
17 testified that Zorn and her husband had been Glacier Bank cus-  
18 tomers for about thirty years. (2005 Tr. 83.) The Zorns were  
19 living in an assisted care facility when her husband died in  
20 April or May of 2005. (Id; 104.) In March of 1984 when Glacier  
21 converted from a mutual saving and loan institution to a publicly  
22 traded stock company, the Zorns purchased approximately \$10,000  
23 worth of Glacier stock. (2005 Tr. 83-84.) Since this initial  
24 public offering, that amount of stock had increased in value to  
25 around \$500,000 without dividend reinvestment. (2005 Tr. 84.)

1        20. After her husband died, Zorn contacted Blodnick during  
2 the summer of 2004 regarding diversification since the Glacier  
3 stock had become the remaining bulk of her estate assets at this  
4 point. (2005 Tr. 84; 93.) He recommended Zorn contact a  
5 registered securities broker such as James' broker, Luckey.  
6 (2005 Tr. 85.) Blodnick had a subsequent conversation with Zorn  
7 prompted by Luckey's call to Blodnick informing him that Zorn  
8 thought Luckey had stolen Zorn's stock certificates. (2005 Tr.  
9 86.) Blodnick explained to Zorn that her stock had not been  
10 stolen, but only transferred from registered Glacier stock  
11 certificates into street name, which was a safer means for her  
12 holding the stock so as to avoid theft. (Id.)

13        21. Luckey testified to contacting Zorn after receiving a  
14 diversification referral for her from Blodnick. (2005 Tr. 89.)  
15 Luckey is a registered, certified financial planner, as well as a  
16 securities principal and branch manager responsible for all com-  
17 pliance issues in her office. (2005 Tr. 90.) She has been in  
18 the securities business since 1982 and with James for about 12  
19 years. (Id.) After meeting with Zorn, and to protect the  
20 certificates of stock from loss, her Glacier securities were  
21 deposited for her in a James account. (Id.) Luckey talked to  
22 Zorn on a number of occasions, encouraging Zorn to talk with her  
23 accountant and lawyer, and even talked to the accountant herself  
24 (2005 Tr. 91) as to what ultimately to do with her concentration  
25 of Glacier stock (2005 Tr. 93) about which Zorn was unsure as  
26 what to do, e.g. gifting, diversification, etc. (2005 Tr. 95-96).

1        22. Even though Luckey had given Zorn receipts for, and a  
2 copy of the deposited stock certificates, Luckey received a call  
3 from Zorn requesting a return of the certificates or a copy of  
4 them. (2005 Tr. 91.) Luckey then made a copy of the receipts  
5 and certificates for Zorn. Upon making personal delivery of  
6 these copies to Zorn, she met Bower for the first time who was in  
7 the presence of Zorn. (*Id.*; 93.) Thereafter, Luckey was con-  
8 tacted by Egan stating that Zorn inferred Luckey had stolen her  
9 securities. (2005 Tr. 92.)

10       23. Zorn testified to being 87 years old (2005 Tr. 99) and  
11 having been visited by Bower several times. (2005 Tr. 101.)  
12 Upon giving Bower a check for \$179.92, he took off so fast it  
13 startled her and she canceled the check. She was very happy with  
14 her Glacier stock, did not want to make any changes regarding  
15 that stock, and was receiving dividend income from that stock.  
16 (2005 Tr. 107.) Zorn remembers Bower telling her that she should  
17 get her stock certificates back as soon as she could. (2005 Tr.  
18 110.) Zorn also wrote a check to Bankers for \$179,779.57 to  
19 accompany a Bankers annuity application. (2005 Tr. 114-115;  
20 Exhibit 5.) Overall, Zorn's remaining testimony indicates a  
21 mental state of great confusion.

22       24. Bower testified to being an insurance agent from March  
23 2000 to November 16, 2004, (2007 Tr. 2) and employed by Bankers  
24 for slightly over two years at the time his license was suspended  
25 in this matter. (2007 Tr. 3-4.) Contrary to this testimony is  
26  
27

1 Bower's earlier statement of having been employed by Bankers for  
2 four and one half years. (2005 Tr. 131.)

3 25. Bower testified that upon his third meeting with Zorn  
4 she was upset regarding stock certificates taken from her home,  
5 so called the State Auditor's office for her in this regard.  
6 (2007 Tr. 14.) Bower believed once he had done this that Zorn's  
7 stock was none of his business (2007 Tr. 15) and did not discuss  
8 investment of her stock certificates with Zorn, nor did he dis-  
9 cuss cashing them in to use the proceeds for purchasing an  
10 annuity product, or any other advice relevant to the stock cer-  
11 tificates. (2007 Tr. 17-18.) However, in Bower's questioning of  
12 Carey in January of 2005, Bower clearly had engaged in a lengthy  
13 discussion of Zorn's stock certificates. (2005 Tr. 129-130; 147-  
14 148.)

15 26. Bower testified to advising Zorn that he was not an  
16 attorney, accountant, or financial advisor and that she should  
17 consult an attorney, or an accounting or financial professional  
18 prior to entering into a contract for a Bankers annuity. (2007  
19 Tr. 16-17.) However, Bower allowed a person to sign Zorn's  
20 annuity application as if that person had been present at the  
21 sales presentation and as if she were a close confidant for Zorn  
22 when that person was not present and not close to Zorn. (2005  
23 Tr. 116.)

24 27. Bower testified to not using pushy sales tactics in his  
25 dealings with Zorn (2007 Tr. 19), but that his contact with Zorn  
26 continued over several months before she actually applied for a  
27

1 Bankers annuity, including at least three personal appearances at  
2 her apartment. (2007 Tr. 12-13.) Bower also personally took  
3 Zorn to the bank to obtain a check backed with money derived from  
4 the sale of a certificate of deposit Zorn owned. (2007 Tr. 52-  
5 53.) Bower offered to take Zorn to her bank for the purpose of  
6 giving him a check to purchase a Bankers annuity. (2007 Tr. 85.)

7 28. Bower testified to not using pushy sales tactics in his  
8 dealings with Ida Rose (2007 Tr. 29), but did return to her home  
9 four or five times, even after she had provided written notice to  
10 Bankers and to Merrill that she did not want to liquidate any of  
11 her securities positions for the purpose of purchasing one of the  
12 annuity products. (2007 Tr. 64; Exhibits 1-4.) Bower made a  
13 phone call from Ida Rose's home to Skiftun, her broker, insisting  
14 she wanted to transfer or liquidate her securities portfolios for  
15 the purpose of purchasing a Bankers annuity (2005 Tr. 66; 68),  
16 however, Skiftun testified to having no recollection that Ida  
17 Rose had told him (Skiftun) to liquidate or otherwise dispose of  
18 her securities holdings during that telephone conversation.  
19 (2005 Tr. 68.)

20 29. Bower testified to not making any factual misrepre-  
21 sentations or untrue promises about the products he was promoting  
22 for Bankers to Zorn, Ida Rose, or the Curries. (2007 Tr. 34.)  
23 However, it clearly appears Zorn was confused about what Bower  
24 was doing or going to do with her money, so cancelled her check  
25 to him because she "got leery." (2005 Tr. 101.) Zorn's testi-  
26 mony admittedly indicates she had little real understanding of

1 the Bankers product Bower attempted to sell to her. (2005 Tr.  
2 98.) Additionally, Ida Rose Lytton clearly had no understanding  
3 of what Bower was proposing. (2005 Tr. 49-56.) The Curries'  
4 understanding of what Bower proposed to do with their money once  
5 he left their home was obviously different from Bower's. (2005  
6 Tr. 71-78.)

7 30. Bower testified to Ida Rose being knowledgeable about  
8 her finances, understanding the annuity product, and having  
9 clarity about her investment goals (2007 Tr. 23-24; 26), but her  
10 testimony and that of her family members was to the contrary.  
11 (2005 Tr. 35-56.)

12 31. Bower testified to Bankers not allowing him to hold  
13 applications for any length of time at all (2007 Tr. 32) but  
14 failed to relay this to the Curries, causing them to believe he  
15 could hold on to their application and check for more than the  
16 period they explicitly expressed to him. (2005 Tr. 71-80.)

17 32. Bower testified to not engaging in securities matters,  
18 or talking to people about securities, and was not qualified to  
19 discuss securities matters (2007 Tr. 47), but the testimonies of  
20 Carey and Bower demonstrate there was an in-depth discussion  
21 about Zorn's Glacier stock certificates that included instruc-  
22 tions from Carey and Crenshaw. (2005 Tr. 129-148.)

23 33. Bower testified to not being qualified as a financial  
24 advisor (2007 Tr. 7), but gave detailed testimony as to Ira  
25 Lytton's financial situation ostensibly for the purpose of  
26 advising and apprising her about purchasing the correct Bankers

1 product, e.g. 2007 Tr. 8-9 (financial goals); 20 (disbursement of  
2 monies); 22 (any monies earning less than 3% guaranteed); 23  
3 (retirement/qualified monies); 27 (maturing CDs); 80 (qualified-  
4 nonqualified funds); 86 (real property).

5 34. P. Lytton testified she has lived 500 yards from her  
6 mother-in-law, Ida Rose for the last twelve years, which includes  
7 the times during which Ida Rose was visited by Bower. (2007 Tr.  
8 88.) She saw Bower at Ida Rose's from 1:30 p.m. to 4:15 p.m. on  
9 November 1, 2004. (2007 Tr. 90-92.) Upon Bower's departure she  
10 was called by Ida Rose regarding her water not working. (Id.)  
11 Upon arriving at Ida Rose's house, she noticed Bower's witness to  
12 a Merrill document which had been signed by Ida Rose. (Id.)  
13 Knowing Ida Rose had an existing Alzheimer's diagnosis (in March  
14 2001) she asked Ida Rose who had been at the house. (Id.) Ida  
15 Rose had no recollection of anyone other than the cat being  
16 there. (Id.)

17 35. P. Lytton testified by describing the outward visible  
18 signs of Ida Rose Lytton's mental disease, including repeating  
19 herself, poor short-term memory, inability to remember to pay her  
20 bills, losing her purse and other items around the house and  
21 found it doubtful that Bower did not observe Ida Rose Lytton  
22 repeating herself during his visits. (2007 Tr. 92-93.)

23 36. Given the testimony and evidence in the record, the  
24 undersigned finds it unfathomable and incredulous that Bower  
25 would not notice the respective incapacities of these individuals  
26 whom he solicited, and leads to but one factual conclusion: each

1 was victimized by Bower via his dealings with them, individually  
2 and collectively.

3 From the foregoing findings of fact, the Hearing Examiner  
4 makes the following proposed:

5 CONCLUSIONS OF LAW

6 1. According to §§ 2-15-1901 and 30-10-107, MCA, the State  
7 Auditor is the ex officio Securities Commissioner a/k/a the  
8 Commissioner of Securities (COS).

9 2. According to § 2-15-1903, MCA, the State Auditor is  
10 also the Commissioner of Insurance (COI).

11 3. The administration of the Securities Act of Montana,  
12 §§ 30-10-101, et seq., MCA, is under the general supervision and  
13 control of the COS. Section 33-10-107, MCA.

14 4. The Montana Department of Insurance is under the  
15 control and supervision of the COI. Sections 2-15-1902 and  
16 33-1-301, MCA.

17 5. The COS has jurisdiction over this matter pursuant to  
18 § 33-10-107, MCA.

19 6. The COI has jurisdiction over this matter pursuant to  
20 § 33-1-311, MCA.

21 7. The Securities Act of Montana shall be construed to  
22 protect investors, persons engaged in securities transactions,  
23 and the public interest. Section 30-10-102, MCA. Under §§  
24 30-10-304 and 305, MCA, the COS has a duty to investigate viola-  
25 tions of the Securities Act of Montana. The COS has jurisdiction  
26 over this matter pursuant to § 33-10-107, MCA.

1        8.     Section 33-1-311, MCA, requires the COI to enforce the  
2 applicable provisions of the insurance laws of this state. Under  
3 § 33-1-311(3), MCA, the COI has a duty to "ensure that the  
4 interests of consumers are protected" and under § 33-1-311(2),  
5 MCA, has authority as may be reasonably implied by the Insurance  
6 Code provisions. Under § 33-1-311(4), MCA, the COI has the  
7 additional duty of conducting investigations and examinations of  
8 insurance matters to determine whether any person has violated  
9 any provisions of the laws of this state.

10       9.     Pursuant to § 30-10-103(11), MCA, an investment advisor  
11 counsels others for compensation, direct or indirect, as to the  
12 value of securities or as to the advisability of investing in,  
13 purchasing, or selling securities.

14       10.    Bankers has a certificate of authority to transact  
15 insurance including annuities pursuant to § 33-2-101, MCA. Bower  
16 is a licensed producer appointed by Bankers pursuant to § 33-17-  
17 236, MCA.

18       11.    Pursuant to § 30-10-201(3), MCA, it is unlawful for a  
19 person to act as an investment advisor without first being  
20 registered as such with DOS.

21       12.    Pursuant to § 33-1-102, MCA, a person may not transact  
22 a business of insurance in Montana or a business relative to a  
23 subject resident, located, or to be performed in Montana without  
24 complying with the applicable provisions of the insurance code.

25       13.    Pursuant to § 30-10-103(22)(a), MCA, a certificate of  
26 deposit is a security.

1        14. While conducting affairs under his insurance producer  
2 license, Bower used fraudulent and coercive tactics, was  
3 untrustworthy, financially irresponsible, and a source of injury  
4 and loss to Zorn, Ida Rose Lytton, and the Curries, each being a  
5 member of the public, in violation of § 33-17-1001(1)(f), MCA.

6        15. By rendering advice regarding the value and sale of a  
7 certificate of deposit to Zorn that would result in compensation  
8 to Bower, Bower acted as an unregistered investment advisor in  
9 violation of § 30-10-201(3), MCA.

10       16. By fraudulently selling unsuitable insurance products  
11 to Montana citizens, and acting with reckless disregard as to  
12 whether his assertions regarding the product were true, Bower is  
13 in violation of § 33-1-1302(a), MCA.

14       17. By recommending that Zorn and Ida Rose Lytton sell  
15 securities without reasonable grounds to believe that the  
16 recommendations were suitable for either person based upon  
17 reasonable inquiry concerning their various investment objec-  
18 tives, financial situation and needs, and any other relevant  
19 known information, such as mental disease or defect and age,  
20 Bower acted fraudulently, in violation of § 30-10-301, MCA.

21       18. Pursuant to § 33-17-1001(1), MCA, the Commissioner may  
22 suspend, revoke, refuse to renew, refuse to issue a license, or  
23 may levy a civil penalty in accordance with § 33-1-317, MCA or  
24 choose any combination of actions when an insurance producer is  
25 found to be in violation of § 33-17-1001, MCA.

19. Pursuant to § 30-10-305(3), MCA, the Commissioner may impose an administrative fine not to exceed \$5,000.00 per violation upon a person found to have engaged in any act or practice constituting a violation of parts 1 through 3 of the Securities Act of Montana or any of its regulation.

20. Pursuant to § 33-1-317, MCA, the Commissioner may impose an administrative fine not to exceed \$5,000.00 per violation of the Montana Insurance Code or regulations.

From the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner proposes to the COS/COI the following:

ORDER

1. The Respondent, Martin Bower's February 16, 2007, Motion to Dismiss pursuant to § 2-4-631(3), MCA, is denied.

2. The Respondent, Martin Bower's February 19, 2007, Motion for Judgment as a Matter of Law pursuant to Rule 50(a) of the Montana Rules of Civil Procedure, is denied.

3. The penalties proposed by the Department for Martin Bower's violations of the Securities Act of Montana and Montana Insurance Code, respectively, are hereby approved and accepted.

4. Pursuant to § 30-10-201(15), MCA, any Montana securities registration of any kind made by Martin Bower is hereby permanently postponed.

5. Pursuant to § 33-17-1001(1), MCA, the insurance Producer License of Martin Bower is hereby revoked for a period of five years from the date of this order.

1        6.    In accordance with § 30-10-305(3), MCA, Martin Bower is  
2 hereby fined the sum of \$10,000 for his investment  
3 recommendations to Zorn.

4        7.    In accordance with § 33-1-317, MCA, Martin Bower is  
5 hereby fined the sum of \$5,000 for attempting to sell an unsuit-  
6 able insurance product to Zorn in the form of a fixed annuity,  
7 and making such attempt with reckless disregard as to whether his  
8 assertions regarding the product were true.

9        8.    In accordance with § 30-10-305(3), MCA, Martin Bower is  
10 hereby fined the sum of \$30,000 for his investment recommenda-  
11 tions to Ida Rose Lytton.

12       9.    In accordance with § 30-10-305(3), MCA, Martin Bower is  
13 hereby fined the sum of \$5,000 for his failure to comply with the  
14 Montana Securities Act.

15       10.   In accordance with § 33-1-317, MCA, Martin Bower is  
16 hereby fined the sum of \$10,000 for his two attempts to sell an  
17 unsuitable insurance product to Ida Rose Lytton in the form of a  
18 fixed annuity, and making such attempt with reckless disregard as  
19 to whether his assertions regarding the product were true.

20       11.   In accordance with § 30-10-305(3), MCA, Martin Bower is  
21 hereby fined the sum of \$5,000 for his fraudulent and coercive  
22 tactics, untrustworthiness, financial irresponsibility, and his  
23 injury and cause of loss to Zorn.

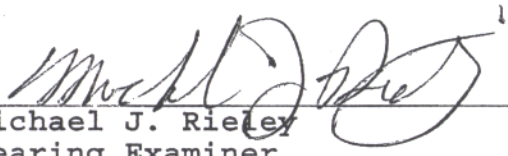
24       12.   In accordance with § 30-10-305(3), MCA, Martin Bower is  
25 hereby fined the sum of \$5,000 for his fraudulent and coercive  
26

tactics, untrustworthiness, financial irresponsibility, and his injury and cause of loss to Ida Rose Lytton.

13. In accordance with § 30-10-305(3), MCA, Martin Bower is hereby fined the sum of \$5,000 for his fraudulent and coercive tactics, untrustworthiness, financial irresponsibility, and his injury and cause of loss to the Curries.

14. In accordance with § 33-1-317, MCA, Martin Bower is hereby fined the sum of \$5,000 for his failure to comply with the Montana Insurance Code.

Dated this 26<sup>th</sup> day of September, 2007.

  
Michael J. Rieley  
Hearing Examiner

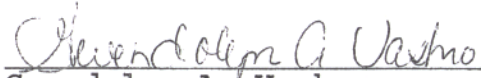
CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Hearing Examiner's Proposed Findings of Fact, Conclusions of Law, and Order upon all parties of record on the 26<sup>th</sup> day of September, 2007, mailing, faxing, or e-mailing a copy thereof to:

Ms. Roberta Cross Guns  
State Auditor's Office  
840 Helena Avenue  
Helena, MT 59601

Mr. Jeffrey M. Doud  
Managhan & Kortum-Managhan Law Firm PLLC  
P.O. Box 938  
Kalispell, MT 59903

Mr. David H. Bjornson  
Bjornson Law Offices, P.C.  
210 North Higgins, Suite 222  
Missoula, MT 59802

  
Gwendolyn A. Vashro

Please read Rule 60(a) corrections at end of this document

BEFORE THE MONTANA STATE AUDITOR  
EX-OFFICIO COMMISSIONER OF SECURITIES AND INSURANCE  
HELENA, MONTANA

IN THE MATTER OF:

MARTIN BOWER,

Respondent.

LEE LYTTON, as Guardian and  
Conservator of IDA ROSE LYTTON,  
an Incompetent Person,

Intervenor.

Case No. I-11-08-04-01

HEARING EXAMINER'S  
RULE 60(a), M. R. CIV. P.  
CORRECTIONS TO PROPOSED  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER

In accordance with Rule 60(a) of the Montana Rules of Civil Procedure (M. R. Civ. P.), the undersigned Hearing Officer hereby issues the following corrections to his Proposed Findings of Fact, Conclusions of Law, and Order issued on, and dated September 26, 2007 (new material is underlined and deleted material is stricken):

1. The first paragraph at line 18 of page 1 through line 6 of page 2 is hereby corrected to read as follows:

Pursuant to mailed notice, on Tuesday, January 11, 2005, in the small Conference Room of the Lake County Courthouse, a contested case hearing was commenced by Kevin Phillips, the initial Hearing Examiner in the above matter. Pursuant to further mailed notice, on Friday, March 16, 2007, in the Second Floor Conference Room 608 of the State Auditor's Office, 840 Helena Avenue, Helena, Montana, a continuation of the January 11, 2005, contested case hearing was conducted to conclusion by the undersigned Hearing Examiner in this matter. The hearing was conducted pursuant to the

HEARING EXAMINER'S RULE 60(a), M. R. CIV. P. CORRECTIONS  
TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 1

Please read Rule 60(a) corrections at end of this document

1 hearings and appeals provisions of the Montana  
2 Insurance Code (§§ 33-1-701, et seq., MCA) and  
3 Securities Act (§§ 30-10-101, et seq., MCA); the  
4 contested case provisions of the Montana Administrative  
5 Procedure Act (§§ 2-4-601, et seq., MCA); and Montana's  
6 statutory, public participation in governmental opera-  
7 tions notice and hearing provisions (§§ 2-3-101, et  
8 seq., MCA).

9  
10 2. The paragraph at lines 7-15 of page 2 is hereby  
11 corrected to read as follows:  
12

13 At the contested case hearing, Roberta Cross Guns,  
14 Legal Counsel for the Montana State Auditor's Office  
15 (MSAO) represented the Insurance and Securities  
16 Departments (respectively, DOI and DOS; collectively,  
17 Department) of the Commissioner of Insurance and  
18 Securities (Commissioner). The Respondent, Martin  
19 Bower (Bower) appeared on his own behalf at the initial  
20 hearing. Jeffrey M. Doud represented him at the con-  
21 tinuation of that hearing. Intervenor, Ida Rose Lytton  
22 (Ida Rose) and her Guardian, Lee Lytton, were repre-  
23 sented by David Bjornson at the continuation hearing.

24 3. The paragraph at line 16 of page 2 through line 2 of  
25 page 3 is hereby corrected to read as follows:  
26

27 At the initial hearing, testimony was presented on  
28 behalf of the Department from Lynne Egan (Egan), DOS  
Bureau Chief; Lee Lytton (L. Lytton), son of Ida Rose  
Lytton; Tim Skiftun, a Merrill registered securities  
salesperson; James and Patricia Currie, Helena Zorn,  
Dan Lytton, and Ida Rose Litton, solicitees of Bower;  
Michael J. Blodnick, CEO of Glacier Bank Corporation;  
Jean Luckey, securities broker for Helena Zorn; and  
John Forsman, MSAO investigator. Curtis Carey,  
Regional Director of Banker's Life and Casualty Company  
(Bankers) provided testimony on behalf of Bower at the  
initial hearing. At the continuation hearing, Bower  
presented testimony on his own behalf followed by  
rebuttal testimony from Pam Lytton (P. Lytton),  
daughter-in-law of Ida Rose Lytton, on behalf of the  
Department.

29 4. Finding of Fact 6 at lines 1-4 of page 6 is hereby  
30 corrected to read as follows:  
31

32 6. Ida Rose testified to having no independent  
33 memory of meeting with Bower (2005 Tr. 49-50); of  
34 speaking with Bower on the telephone (2005 Tr. 53); and  
35

36 HEARING EXAMINER'S RULE 60(a), M. R. CIV. P. CORRECTIONS  
37 TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 2  
38

Please read Rule 60(a) corrections at end of this document

1 not understanding what Exhibits 1-4 were, only  
2 recognizing her signature (2005 Tr. 50-52).

3 5. Finding of Fact 12 at line 21 of page 7 through line 2  
4 of page 8 is hereby corrected to read as follows:

5 12. Bankers' Regional Director, James Curtis  
6 Carey (Carey) from its Spokane insurance branch office,  
7 (2005 Tr. 150) testified to being securities licensed,  
8 and a licensed insurance agent in Montana since the  
9 Spring of 2003 (2005 Tr. 127; 143), and in charge of  
hiring and training agents (2005 Tr. 127). He is  
licensed/registered as a representative and not as an  
investment advisor, and does not supervise any  
securities sales people. (2005 Tr. 145.)

10 6. Finding of Fact 13 at lines 3-20 of page 8 is hereby  
11 corrected to read as follows:

12 13. Carey recalled Bankers unit sales manager,  
13 Bill Crenshaw (Crenshaw), whom Carey testified is  
14 securities licensed in Montana, but is not registered  
15 as an investment advisor (2005 Tr. 152), saying he had  
16 received a telephone call from Bower about a person in  
17 Kalispell who had long time stock that had great  
18 appreciation and advised Bower of the potential for a  
19 big tax issue. (2005 Tr. 129-30.) In a follow-up  
20 conversation with Crenshaw, Carey was told Bower was  
21 asked not to proceed. (2005 Tr. 130.) Carey was not  
22 aware of any annuity purchase application coming  
23 through his office regarding these securities,  
24 identified by Bower as being Zorn's. (2005 Tr. 130-  
25 31.) He recalls no complaints made to his office  
26 regarding pushy sales tactics by Bower. (2005 Tr.  
27 131.) For Carey, an indicator of an agent's  
28 aggressiveness is a reported "go-back" ratio, which to  
him means the more go-backs, the less aggressive.  
Bower's 35-40% ratio is higher than the average in  
Carey's office. (2005 Tr. 134.) For Carey, go-backs  
do not translate into coercion without someone calling  
and telling him so. (2005 Tr. 155.)

7. Conclusion of Law 5 at lines 17-18 of page 17 is hereby  
corrected to read as follows:

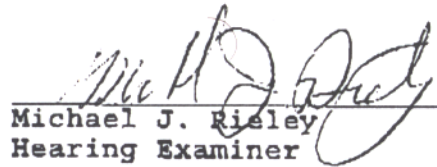
5. The COS has jurisdiction over this matter  
pursuant to § 330-10-107, MCA.

Please read Rule 60(a) corrections at end of this document

8. Conclusion of Law 7 at lines 21-26 of page 17 is hereby corrected to read as follows:

7. The Securities Act of Montana shall be construed to protect investors, persons engaged in securities transactions, and the public interest. Section 30-10-102, MCA. Under §§ 30-10-304 and 305, MCA, the COS has a duty to investigate violations of the Securities Act of Montana. The COS has jurisdiction over this matter pursuant to § 330-10-107, MCA.

Dated this 23<sup>rd</sup> day of October, 2007.

  
Michael J. Rieley  
Hearing Examiner

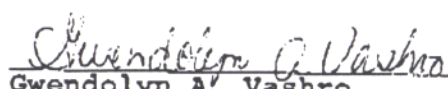
CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Hearing Examiner's Rule 60(a), M. R. Civ. P. Corrections to Proposed Findings of Fact, Conclusions of Law, and Order upon all parties of record on the 23<sup>rd</sup> day of October, 2007, mailing, faxing, or e-mailing a copy thereof to:

Ms. Roberta Cross Guns  
State Auditor's Office  
840 Helena Avenue  
Helena, MT 59601

Mr. Jeffrey M. Doud  
Managhan & Kortum-Managhan Law Firm PLLC  
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Kalispell, MT 59903

Mr. David H. Bjornson  
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210 North Higgins, Suite 222  
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Gwendolyn A. Vashro

HEARING EXAMINER'S RULE 60(a), M. R. CIV. P. CORRECTIONS  
TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 4